Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–8 OF 2007(W)
ZAKI AZMI PCA, ARIFIN ZAKARIA AND HASHIM YUSOFF FCJJ
22 SEPTEMBER 2008

Administrative Law — Disciplinary proceedings — Delay in commencement of — Whether delay sufficiently explained — Whether respondent deprived of procedural fairness

Administrative Law — Exercise of judicial functions — Jurisdiction — Civil court — Disciplinary proceedings — Determination of procedural fairness — Whether court could place itself in shoes of disciplinary authority — Provisions of general orders

Administrative Law — Rights and liabilities of public servants — Dismissal — Disciplinary proceedings — Whether wrongful dismissal — Whether given opportunity to be heard orally — Whether delay in initiating disciplinary proceedings sufficiently explained

The instant appeal was related to the dismissal of one M Senthivelu a/l R Marimuthu ('deceased'), a clerk in the Postal Department, by the first appellant as the disciplinary authority under the general orders. His action for wrongful dismissal against the appellants ('the action') was dismissed. However, he was successful in his appeal to the Court of Appeal mainly on the grounds of delay in the disciplinary authority commencing and completing the disciplinary proceedings. Upon his death, his daughter was substituted as the respondent. The disciplinary proceedings were commenced against the deceased on a disciplinary charge of unlawfully withdrawing monies from the accounts of 16 account holders with the Pejabat Pos Sitiawan, Perak. In the action the deceased alleged that the first appellant had failed to state the grounds upon which the disciplinary action was taken and that the first appellant had wrongly initiated the disciplinary proceedings by the issuance of the letter dated 18 October 1984. He had further submitted that there was a delay of more than seven years before the show cause letter was sent to him, which, according to him was unexplained. The questions

referred to the court was, inter alia, whether the court could place itself in the shoes of the disciplinary authority in determining whether a particular procedure is fair or not, issue of delay in initiating the disciplinary proceeding, whether it was the court and not the disciplinary authority to decide whether the deceased had exculpated himself in his written representation, whether the deceased should have been granted an opportunity to be heard orally.

Held, allowing the appeal with no order as to costs:

(1) From the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it. It was clear from the facts that the deceased was given an opportunity to be heard whereby he had given a lengthy letter explaining in detail his innocence. Further, it was not the court, but the disciplinary authority who was to decide the question of whether he had exculpated himself by his written representation (see paras 24–25 & 43–44).

(2) On the facts, it was clear that part of the delay was attributable to the police for having taken four years before they made the decision not to proceed against the deceased on criminal charges. Further, the allegations of delay were made in the letter of representation of the deceased. The appellants could not admit or deny the claims because they were never pleaded in the statement of claim. In any event, even if what was claimed was accepted as true, the delay was substantially caused by the police and not the disciplinary authority (see paras 27, 32 & 36).

(3) In the instant case, the second appellant could not be said to have condoned the acts of the deceased because the deceased, as admitted by him in his letter, was interdicted ('ditahan kerja'). Further, condonation was not pleaded (see paras 39–40).

[Bahasa Malaysia summary

Rayuan ini berkaitan pemecatan M Senthivelu a/l R Marimuthu ('si mati'), seorang kerani di Jabatan Pos, oleh perayu pertama sebagai pihak berkuasa tatatertib di bawah perintah am. Tindakannya untuk pemecatan salah terhadap perayu-perayu ('tindakan tersebut') telah ditolak. Walau bagaimanapun, dia berjaya dalam rayuannya ke Mahkamah Rayuan terutamanya atas alasan kelewatan pihak berkuasa tatatertib memulakan dan menyelesaikan prosiding tatatertib. Setelah kematiannya, anak

perempuannya telah digantikan sebagai responden. Prosiding tatatertib telah dimulakan terhadap si mati atas pertuduhan tatatertib kerana telah menyalahi undang-undang mengeluarkan wang daripada akaun-akaun 16 pemegang akaun Pejabat Pos Sitiawan, Perak. Dalam tindakan tersebut si mati mendakwa bahawa perayu pertama telah gagal menyatakan alasan-alasan kenapa tindakan tatatertib tersebut diambil dan bahawa perayu pertama telah salah memulakan prosiding tatatertib dengan mengeluarkan surat bertarikh 18 Oktober 1984. Dia seterusnya berhujah bahawa terdapat kelewatan lebih daripada tujuh tahun sebelum surat tunjuk sebab dihantar kepadanya, yang mana, menurutnya tidak dijelaskan. Persoalan-persoalan yang dirujuk ke mahkamah adalah, antara lain, sama ada mahkamah boleh meletakkan dirinya sebagai pihak berkuasa tatatertib dalam menentukan sama ada prosedur tertentu itu adil atau tidak, isu kelewatan dalam memulakan prosiding tatatertib, sama ada ia adalah mahkamah dan bukan pihak berkuasa tatatertib untuk memutuskan sama ada si mati dapat membebaskan dirinya dalam representasi bertulisnya, sama ada si mati patut diberikan peluang untuk didengar secara lisan.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

(1) Berdasarkan peruntukan perintah am adalah jelas bahawa ia bukan niat penggubal undang-undang agar mahkamah patut bertindak sebagai pihak berkuasa tatatertib dalam memutuskan sama ada ia adalah adil kepada responden untuk diberikan hak membuat representasi secara lisan atau sama ada dia patut diberikan hak sedemikian meskipun dia tidak memintanya. Adalah jelas dari fakta bahawa si mati telah diberikan peluang untuk didengar di mana dia telah memberikan surat yang panjang lebar menjelaskan secara terperinci tentang ketakbersalahannya. Bahkan, ia bukan mahkamah, tetapi pihak berkuasa tatatertib yang memutuskan persoalan sama ada dia telah membebaskan dirinya melalui representasi bertulianya (lihat perenggan 24–25 & 43–44).

(2) Atas fakta, adalah jelas bahawa sebahagian dari kelewatan adalah disebabkan oleh pihak polis yang mengambil empat tahun sebelum mereka membuat keputusan untuk tidak meneruskan pertuduhan jenayah terhadap si mati. Tambahan pula, pengataan tentang kelewatan telah dibuat dalam surat representasi si mati. Perayu-perayu tidak boleh mengakui atau menafikan dakwaan tersebut kerana ia tidak diplidkan dalam penyataan tuntutan. Dalam apa keadaan, meskipun apa yang didakwa telah diterima sebagai yang benar, kelewatan tersebut lebih disebabkan oleh pihak polis dan bukan pihak berkuasa tatatertib (lihat perenggan 27, 32 & 36).

(3) Dalam kes ini, perayu kedua tidak boleh dikatakan telah memaafkan tindakan-tindakan si mati kerana si mati, sebagaimana yang telah diakui olehnya dalam suratnya, telah ditahan kerja. Tambahan, pemaafan tidak diplidkan (lihat perenggan 39–40).]

Notes

For cases on delay in commencement of disciplinary proceedings generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 3–4.

For cases on dismissal, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 732–766.

For cases on jurisdiction, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 72–73.

Cases referred to

Azman bin Abdullah v Ketua Polis Negara [1997] 1 MLJ 263 (refd)

Baker v Canada (Minister of Citizenship and Immigration) (1999) 174 DLR (4th) 193 (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara & Anor [1994]2 MLJ 114 (refd)

Gimstern Corporation (M) Sdn Bhd v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)

Harbajan Singh v Suruhanjaya Pasukan Polis Malaysia & Anor [2002] 3 MLJ 714 (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Kioa v West (1985) 159 CLR 550 (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417 (refd)

Lloyd v McMahon [1987] AC 625 (refd)

Raja Abdul Malik Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 (refd)

Raphael Pura v Insas Bhd & Ors [2003] 1 MLJ 513 (refd)

Robert Lee @ Rober Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393 (refd)

Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1 (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364 (refd)

Shane v Kaka Singh Dhaliwaf [2008] 3 CLJ 198 (refd)

Tai Choi Yu v Government of Malaysia [1994] 1 MLJ 678 (refd)

Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd [1996] 2 MLJ 596 (refd)

Legislation referred to

Public Officers (Conduct and Discipline) General Orders (Chapter D) 1980 general orders 24, 25, 26, 26(6), 26(7), 27, 27(1), 28

Karpal Singh (Subramaniam Nair with him) (Karpal Singh & Co) for the applicant.

Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Zaki Azmi PCA (delivering judgment of the court):

[1] Leave was granted to refer to this court the following four questions:

(i) whether the court could place itself in the shoes of the disciplinary authority acting under the general orders in determining whether a particular procedure is fair or not;

(ii) ;in considering whether or not disciplinary proceedings under the general orders were procedurally fair, must regard be given to the length of time taken for initiating the disciplinary proceedings, the nature of the charge and the reasons for the length of time taken;

(iii) whether it is the court, and not the disciplinary authority to decide whether the officer had, in his written representation, exculpated himself from the charges preferred against him;

(iv) whether the disciplinary authority acting under the general orders ought to have granted the respondent an opportunity to be heard orally notwithstanding that he did not ask for an oral hearing.

[2] At the outset, perhaps I should mention these grounds of judgment took longer to be prepared since parties requested time to provide supplementary written submissions the last of which we did not receive until recently.

[3] This appeal relates to the dismissal of one M Senthivelu a/l R Marimuthu ('deceased'), a clerk in the Postal Department by the first appellant as the disciplinary authority under the general orders. He filed, in the High Court at Kuala Lumpur, an action by way of a writ against the appellants for wrongful dismissal. This action was dismissed with costs. He appealed to the Court of Appeal. The Court of Appeal allowed his appeal with costs on 11 July 2005 mainly for reason of delay in the disciplinary authority commencing and completing the disciplinary proceedings. He died after that decision was delivered and his daughter was substituted as respondent (at the Court of Appeal, the respondent was cited as M Senthivelu a/l R Marimuthu) in this present appeal. The appellants are the Public Services Commission Malaysia and the Government of Malaysia.

[4] The deceased being a government servant, the disciplinary action against him is governed by the Public Officers (Conduct and Discipline) General Orders (Chapter D) 1980.

[5] The facts of this case went to as far back as 18 October 1984 when disciplinary proceedings were commenced against the deceased on a disciplinary charge of unlawfully withdrawing monies from the accounts of 16 account holders with the Pejabat Pos Sitiawan, Perak. According to the charge, the deceased had withdrawn from these 16 accounts a total of RM6,050 between 3 January 1977 to 13 May 1977. The disciplinary proceedings were only commenced against him seven years after the alleged offences were committed. The full charge is reproduced below:

> Bahawa tuan, Santhivelu a/l R Marimuthu yang bertugas sebagai Pegawai Kerani Pos, Tingkatan Biasa, Pejabat Pos Sitiawan, Perak telah mengeluarkan wang sejumlah $6,050 (Enam Ribu Lima Puluh Ringgit) daripada akaun penyimpan-penyimpan Bank Simpanan Nasional pada tarikh-tarikh dan jumlah-jumlah seperti yang dinyatakan di Lampiran 'A'. Tuan telah melakukan perbuatan tersebut dengan menyediakan borang-borang pengeluaran wang dari 16 Buku Kira-Kira Bank Simpanan Nasional penyimpan-penyimpan itu secara palsu dan mengemukakannya kepada sama ada Puan T. Renggyah, Pegawai Kerani Pos, Pejabat Pos Sitiawan atau Encik Othman bin Abdullah, Pegawai Kerani Pos, Pejabat Pos Sitiawan supaya mereka mengeluarkan wang di bawah kawalan mereka setelah tuan meyakinkan mereka bahawa catatan telahpun tuan buat sendiri di dalam Buku Kira-Kira penyimpan, tetapi sebenarnya catatan tidak pernah dibuat dan Buku Kira-Kira Simpanan penyimpan tersebut tidak pernah ada pada tangan tuan. Dengan itu tuan telah berkelakuan tidak jujur dan tidak bertanggungjawab bertentangan dengan Perintah Am 3(g) dan 3(h), Bab 'D' 1969.

[6] Almost immediately after receiving the charge, the deceased made his representations to the first appellant by way of a letter dated 23 November 1984. After considering his representation, the appellant dismissed the deceased from service. This was done by letter dated 9 July 1985 issued by the 1 appellant. The declaration sought by the deceased was that the dismissal was unlawful and of no effect and that the deceased was still a clerk in the postal service and entitled to all the salaries and benefits attached to the position. He grounded his claim on the following paras 8, 9 and 10 of the statement of claim:

> 8. The plaintiff contends that there were material irregularities in the procedure adopted by the first defendant in attempting to initiate disciplinary proceedings against the plaintiff in that:

(i) The first defendant should have stated the grounds upon which it intended to take disciplinary action and not proffered the charge against the plaintiff.

(ii) The first defendant had in fact initiated wrongful disciplinary proceedings in having sent the letter dated 18 October 1984 to the plaintiff.

9. The plaintiff further pleads that due to the said material irregularities mentioned above, he was absolved from having to reply to the said show cause letter of 18 October 1984.

10. The plaintiff contends there has been infringement of the provisions of art 135(2) of the Federal Constitution in that the plaintiff was not afforded an opportunity to present his views on punishment before the punishment referred to hereinbefore was imposed on him. The punishment imposed on the plaintiff under the circumstances violates the rules of natural justice.

[7] The appellants (who were defendants in the High Court) denied the allegations made in paras 8 and 9 of the statement of claim.

[8] At the High Court, this was what happened. It is not disputed that upon proposal by the deceased, the appellants agreed that since there was no dispute of facts, the parties be allowed to put in written submissions without calling witnesses. Amongst the agreed bundle of document was a letter written by the deceased dated 23 November 1984 which was pleaded in his statement of claim. I find that this letter contains the facts upon which the present appeal is partially based on. I will deal with the contents of the letter later.

[9] From para 8 of the statement of claim it is clear that the deceased had alleged that the first appellant failed to state the grounds upon which the disciplinary action is taken and that the first appellant had wrongly initiated the disciplinary proceedings by the issuance of the letter dated 18 October 1984. The High Court relying on the decision of Jemuri Serjan SCJ in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 held that there was no merit in the plaintiff's allegation. The deceased in his written submission claimed that there was a delay of more than seven years before the show cause letter was sent to him. This delay according to him was unexplained. The High Court ruled against him on this issue on the ground that it was never pleaded in the statement of claim.

[10] At the Court of Appeal this issue of the alleged seven years delay in bringing the charges was again raised and the Court of Appeal reversed the

decision of the High Court on the ground that the deceased was deprived of procedural fairness. The Court of Appeal did not discuss the failure to plead this ground.

[11] Regarding para 10 of the statement of claim that he was not afforded an opportunity to present his views on punishment before punishment was imposed, the learned judge, quite correctly in my opinion, held that this claim was baseless. On this issue I am of the opinion that the show cause letter issued by the first appellant clearly stated that the deceased was liable to be dismissed from service. The show cause letter mentioned that the disciplinary authority '... mengambil tindakan tatatertib dengan tujuan buang kerja terhadap tuan ...'.

[12] According to *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417, as far as the principles of natural justice and procedural fairness are concerned, the general orders are in accordance with those principles. I do not need to restate the principles set out in that case.

QUESTIONS (i) AND (iv)

[13] Question (i) arose from a statement by the Court of Appeal. That statement reads:

> Bearing in mind the principles stated in the foregoing authorities, the question I must ask — which is the question the learned judge, with respect, failed to ask himself — is this: placing myself, as I do, in the shoes of the disciplinary authority in this case, was it sufficiently fair to the appellant to have granted him an opportunity to make written representations or ought he to have been given an opportunity to be heard orally notwithstanding that he did not ask for an oral hearing?

[14] It is therefore submitted by the appellants that the question in this case is 'whether the court could place itself in the shoes of the disciplinary authority acting under the general orders in determining whether a particular procedure is fair or not'.

[15] This principle was formulated from several cases from Australia (*Kioa v West* (1985) 159 CLR 550, Federal Court of Australia), Canada (*Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193, Supreme Court) and the Privy Council (*Lloyd v McMahon* [1987] AC 625, an appeal from New Zealand).

[16] It is quite well established that the courts in Malaysia should be wary in adopting principles of law which is based on the common law of England when there is specific provision in our statute. Jemuri Serjan J in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara & Anor* [1994]2 MLJ 114 said this (at pp 120–130):

> Lest we forget in that case His Lordship was dealing with judicial review at common law and the passage above does not apply to a case regulated by statutes or subsidiary legislation which have legislative effect.
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> ...
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> Similarly, in this case, we have examined the relevant provisions of the general orders 1980 (Chapter D), and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry under the circumstances of this case was not justified. In dealing with general orders 1980 (Chapter D) we remind ourselves that we are dealing with general orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at p 110:
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> > ... if the legislation has made provision for that opportunity to [to be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the Legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

[17] In *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1, Nik Hashim FCJ in his judgment put importance on the court to warn itself to decide within the intended legislative effect of the general orders.

[18] In *Raphael Pura v Insas Bhd & Ors* [2003] 1 MLJ 513, Abdul Hamid Mohamad FCJ (as he then was) said (at p 536):

> In my view, this court is bound by the provisions of our own Rules and not that of any other country ...
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> Furthermore, this court too should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms parts of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s 3(1) of the Civil Law Act 1956, must always be borne in mind.

[19] In a subsequent case of *Robert Lee @ Rober Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393, the same learned Federal Court judge (as he then was) reiterated that principle by saying (at p 408):

> It is true that the courts, through its decisions try to arrive at a 'fair and just' result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. ...

[20] Earlier to this, the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 held (at p 357):

(d) Because the principle of the common law has been incorporated into statutory law... the trend or any change in the common law elsewhere is not relevant. Any change in the common law after 7 April 1956 shall be made by our own courts.

(e) Since the doctrine of severance is to be applied according to the facts of each case and that to some extent each case must depend on its own circumstances and on the nature of the illegality itself, the application of the doctrine of severance should have been pleaded and argued in the court of first instance and not at this late stage.

[21] So from this line of cases, it is clear that the courts should not import common law from other countries where legislation in Malaysia has clearly provided for it.

[22] According to general orders 24, 25 and 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, the disciplinary authority is required to first determine whether the disciplinary offence committed by any officer merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank. Should they decide that he could be punished with dismissal or reduction in rank, then the disciplinary authority is required to send to the officer a statement in writing of the ground or grounds which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing, within a period of not less than fourteen days from the date of receipt of the letter, a representation containing grounds which the officer relies to exculpate himself. Should the disciplinary authority consider that the case against the officer requires further clarification then it may appoint a committee of inquiry. This is a decision of the disciplinary authority, not the officer or the court. At this enquiry the officer will be allowed and if the committee shall so determine shall be required to appear before it and exculpate himself. Again this is the decision of the disciplinary authority. The wording of general

order 26(6) is sufficiently clear that his right to appear and exculpate himself in person is at the discretion of the Committee of Inquiry. That provision reads:

> The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determined (sic), shall be required to appear before the Committee and exculpate himself.

[23] General order 26(7) imposes a duty upon the committee to give the officer an opportunity to be present and to question any witnesses examined by the committee, but then only if the witnesses are called by the committee. That general order reads:

> If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

[24] From this, it is clear that it is never the intention of the legislators to give an officer under disciplinary action the right to give oral evidence. In any case as far as the deceased was concerned, he was given an opportunity and he did give a very lengthy letter explaining in detail why he could not have committed the acts of which he was charged under. He said in his letter that he was prepared to appear before the disciplinary authority to answer questions that the disciplinary authority may wish to pose to him. Obviously the disciplinary authority decided from the evidence available to it that it was not necessary to hear the deceased in person.

[25] From the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.

[26] This clearly disposes of questions (i) and (iv). I would answer both questions in the negative.

QUESTION (ii)

[27] Before discussing the law, let us revert to the facts. As mentioned earlier, according to the show cause letter issued to him by the disciplinary authority dated 18 October 1984 he was accused of having withdrawn a total of RM6050 from the accounts of 16 Bank Simpanan Nasional account

holders between 3 January 1977 and 13 May 1977. From his letter of representation it would seem that the police had been investigating the same allegations since 1978. During the investigation, according to the deceased's letter, the police took away seven saving account books belonging to him and his children. These books were returned to him only on 1 March 1982, ie after a lapse of four years. It was only two and a half years later that disciplinary action was commenced against him by the issue of the letter dated 18 October 1984. It is clear from here that part of the delay in fact was attributable to the police for having taken four years before they made the decision not to proceed against him on criminal charges. It was therefore wrong for the Court of Appeal to have concluded that the delay was attributed to the disciplinary authority.

[28] Perhaps the reason why the disciplinary authority did not decide to take disciplinary action against him before the police completed their investigation is the existence of general order 27. That general order provides that where criminal proceedings are being instituted against an officer no proceedings for his dismissal upon any grounds involved in the criminal charge may be taken against him pending the conclusion of the criminal proceedings. General order 27(1) requires the Registrar of the court in which proceedings are instituted to send to the head of department a report containing, inter alia, the charge against the officer. It provides:

> (1) Where criminal proceedings are instituted against an officer, the Registrar or the Senior Assistant Registrar of the Court in which the said proceedings are instituted, shall send to the Head of Department a report containing the following information —
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> (a) at the commencement of the said proceedings, the following information —
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> (i) the charge or charges against the officer;
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> (ii) if arrested, the date and time when the officer was arrested;
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> (iii) whether or not he is on bail; and
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> (iv) other relevant information; and
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> (b) at the conclusion of the said proceedings, the judgment of the court.

From this, it must be concluded that criminal proceedings commence when the officer is charged in court for a criminal act. Because of this provision and because the basis of the disciplinary action would be the commission of a criminal offence, no disciplinary action in such a case can commence against the officer until after the police has completed their investigations and they

decide not to charge him in court. If the police decides to charge him, all disciplinary actions against him will be put on hold until the disposal of the criminal charges. General order 28 provides:

> Where criminal proceedings are being instituted against an officer, no proceedings for his dismissal upon any grounds involved in the criminal charge may be taken against him pending the conclusion of the criminal proceedings, but nothing in this General Order shall prevent disciplinary action from being taken against him during the said proceedings on any other ground arising out of his conduct in the performance of his duties.

[29] It is quite well known that the period taken by the police to investigate a case is normally unpredictable and indeterminable by the complainant or the suspect. The deceased made allegations of the delay in his letter. But then these allegations are only what appeared in his letter of representation. They are only what the deceased claimed to be. We do not know what had actually occurred. The appellant was not given a chance to adduce evidence to admit or deny these claims at trial. The appellants could not admit or deny these claims because these claims were never pleaded in the statement of claim. It first arose in the respondent's submission at the High Court. In fact the respondent could have sought to amend his statement of claim even at that stage. Why was this not done? It must be remembered that it was the respondent who proposed the simplification of hearing, and this was consented to by the appellant, that the facts and issues be agreed to without calling witnesses.

[30] Since case authorities say that whether there is unreasonable delay depends on the circumstances of each case, delay per se cannot be construed against the appellant. In fact the Court of Appeal said so in its judgment. At para 3 of the Court of Appeal judgment, it said:

> ... *It all depends on the facts of each case*. In particular it depends on a number of factors, including the nature of the charge, the length of the delay, the reasons for the delay the opportunity which the employee had to evidentially meet the accusation leveled at him. In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct. (Emphasis added.)

Again, later in the judgment the Court of Appeal said:

> ... It is well settled that the content of procedural fairness is flexible *according to particular facts and circumstances* and this was recognised by this court in *Raja Abdul Malek Muzaffar Shah bin Raja Sharuzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors*.

[31] How could a court consider reasons for the delay when delay is not pleaded? Civil proceedings are based on pleadings by which each party is given the opportunity to claim, reply or deny. In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J said:

> It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. *It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties.* It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. *In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.* If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ. (Emphasis added.)

[32] Even if what is claimed by the respondent in his letter is accepted as true, the delay, as mentioned above was substantially caused by the police, and not the disciplinary authority. Delay by the disciplinary authority, even if it is considered as delay, was for a period of two and a half years, instead of seven years as accepted by the Court of Appeal in its judgment.

[33] In order for the court to decide whether any delay is reasonable or not, the appellant must have been given the opportunity to explain the reasons for such delay and this can only be done if such delay was pleaded and becomes an issue to be considered by the court (see *Harbajan Singh v Suruhanjaya Pasukan Polis Malaysia & Anor* [2002] 3 MLJ 714, *Tai Choi Yu v Government of Malaysia* [1994] 1 MLJ 678 and *Gimstern Corporation (M) Sdn Bhd v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302).

[34] The general orders do not provide for the time when a disciplinary action is required to be taken against any officer for a disciplinary offence. Applying the principles earlier stated that where procedure is provided by written laws then the courts should be wary of invoking common law, the delay, even if there was one, is not a ground for holding that there was a procedural unfairness.

[35] On the issue as to whether the deceased had pleaded that there was procedural unfairness because of the delay, appellant before us cited *Raja Abdul Malik Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619. The Court of Appeal said (at p 628):

> I respectfully agree with the observation made during the course of argument by my learned sister, Siti Norma Yaakob JCA, that *once the fairness of the procedure adopted was sufficiently raised and challenged, then all matters relevant thereto were put in issue without the need for a further specific plea in that respect*. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Commodore Pty Ltd v Perpetual Trustee* [1984] 1 NZLR 324 at p 349.
>
> I really do not see how the defendants can complain that they were taken by surprise; more so when they made no complaint before the trial judge when the point was raised by counsel for the plaintiff in his submissions. Further, there is nothing in the judge's note to say that the argument was being disregarded because it was not pleaded. In these circumstances, I am convinced that there is no merit in the pleading point. (Emphasis added.)

[36] The respondent asked us to read the words underlined as enabling the respondent to raise delay without having to plead it specifically since the question on fairness of procedure is already in issue before the court. I think that is too general a statement. It would not be right for any party to merely allege procedural unfairness in general and expects the other party to guess what the grounds and facts are. The court also went on to say in that judgment 'the object of modern pleadings is to prevent surprise and to enable dispute to be litigated in an orderly fashion'. This is very true indeed. In the present case, how could the respondent say that the appellant should not have been surprised by the respondent raising the question of delay? There was not even a hint of such allegation in his statement of claim. Secondly, it was on the suggestion of the appellant that no witnesses be called and it would be based only on pleadings and agreed facts. If evidence had been adduced and delay became an issue at least the appellant would have had a chance to justify the delay, if it is found that there was indeed a delay.

[37] The respondent also argued that although the question of delay was not heard by the High Court except in its submission, this issue can be considered by the Court of Appeal. In support thereof, the case of *Shane v Kaka Singh Dhaliwaf* [2008] 3 CLJ 198 was referred. But in that case, what was prayed at the Court of Appeal was solely on the point of law based on undisputed facts. In this case before us, the evidence of delay was not even adduced at the hearing in the High Court. Those facts relating to the alleged delay are all facts in issue.

[38] The appellant submitted that this issue of delay being a question of law must be decided based on the facts of each case. The Court of Appeal in *Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd* [1996] 2 MLJ 596 in the judgment of Gopal Sri Ram JCA, is in agreement to this principle. He clearly said (at pp 603–604):

> It is axiomatic that for this principle of law to apply there must first be in existence a substratum of facts, the existence of which is postulated by the principle. Absent such facts, and the proposition becomes quite irrelevant.
>
> ...
>
> In our judgment, the learned judge was entirely right in ignoring the point because it was not pursued under cross-examination of the plaintiffs witness. In the absence of a suggestion that the delay had been caused by the so-called extra works, the judge was entitled to proceed upon the basis that the defendants were no longer advancing this as a reason for the delay.

Without the respondent pleading the issue of delay, the appellant was not able to address the same in answer. This issue of delay is therefore not one that deserves addressing by this court in this instant case.

[39] On the question of condonation raised by the respondent and referring to the case of *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263, I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. Condonation can be in the active form ie by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action. *Halsbury's Laws of England* (4th Ed) Vol 16 at p 439 para 648 describe condonation as follows:

> An employer who with full knowledge of his employee's misconduct elects to continue him in service cannot subsequently dismiss him for the offence which he has condoned.

In our case, the second appellant cannot be said to have condoned the acts of the deceased because the deceased, as admitted by him in his letter, was interdicted ('ditahan kerja').

[40] Also again condonation was not pleaded. However, although there was a delay between the time the police completed their investigation and the time when the show cause letter was issued, there was nothing to indicate that the disciplinary authority intended to condone the wrongs committed by the deceased. In any case, the delay was because the police was investigating the case and the disciplinary authority cannot be said to have condoned the acts of the deceased.

[41] The answer to question (ii) is therefore that under the Public Officers (Conduct and Discipline) General Orders (Chapter D) 1980 delay per se is not a ground for holding that the disciplinary action should be held null and void and the decision to be set aside. It depends on circumstances of each case and whenever the issue of delay is raised the disciplinary authority must be given an opportunity to explain the delay. Without that opportunity being given to the disciplinary authority, it could not be determined whether such delay is reasonable or not.

QUESTION (iii)

[42] The arguments in answer to questions (i) and (iv) have a bearing on this question.

[43] I had mentioned in para 22 above, according to general orders 24, 25 and 26, the decision whether to refer a case to a Committee of Inquiry is the discretion of the disciplinary authority. In so deciding whether to refer to the Committee of Inquiry, the disciplinary authority would have to consider the written representation of the respondent, ie whether his written representation exculpated himself from the charges preferred against him.

[44] From these general orders, it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself. The answer to question (iii) must therefore be answered in the negative, ie that it is not the court but disciplinary authority who is to decide this question of whether he has exculpated himself by his written representation.

ERRORS

[45] By the way, going through the record of appeal, there was an error appearing in the show cause letter issued by the first appellant. I have given serious thought to this error to determine whether they had prejudiced the deceased. Our attention was not drawn to this by either party.

[46] The error appears in the show cause letter issued to the deceased dated 19 October 1984 reference SPA.10638/3/(96). It is headed 'SURUHANJAYA PERKHIDMATAN KEHAKIMAN DAN PERUNDANGAN'. Obviously the deceased cannot be subject to the Judicial and Legal Services Commission. However, I take this to be a clerical error since the signatory to that letter was the secretary to the Suruhanjaya Perkhidmatan Awam. The deceased was also not prejudiced because his reply

was addressed to Setiausaha Suruhanjaya Perkhidmatan Awam.

CONCLUSION

[47] While I personally sympathise with the deceased as to the time taken to dispose this case at the disciplinary proceeding, I am bound to decide this case according to the law. It is most regrettable that the police took four years to investigate the reports against him and the disciplinary authority took another two and a half years to decide against him. As if this is not enough, the courts itself took about 22 years from 1986 to now to finally decide the case. Credit must however be given to the deceased and the family for pursuing this case up to this stage. It is hoped that all authorities will in future expedite investigation of such cases. Delay causes anxiety and in some circumstances may cause injustice. The authorities should perhaps consider setting time lines in their rules to ensure that there is no delay and investigations are completed within shortest possible time.

[48] I realise that everybody is busy but they should place themselves in the position of the suspect or officer under discipline and their families. Perhaps if they do so, then they may appreciate how these people feel while waiting for the conclusion of their cases. This of course equally applies to the judiciary. In this case however, the deceased was perhaps also the author of his own misfortune by failing to properly plead his case at the High Court.

[49] The appeal is therefore allowed. In the circumstances of this case, we make no order as to costs.

[50] Both my learned brother judges Arifin FCJ and Hashim FCJ have read this judgment in draft and agreed with it.

Appeal allowed with no order as to costs.

Reported by M Sivabarathi